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IN THE

Supreme Court of the United States

No. 458

DR. HENRY L. PECKHAM, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Dr. Henry L. Peckham, Jr., by his counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia. This Court on December 5, 1955, denied the Petition for Certiorari.

QUESTION PRESENTED

1. The Sixth Amendment to the Constitution is violated when one is not adequately informed of the charges against him. Is it not also violated when as in this case an accused is erroneously informed of the charges against him such that he is misled in preparing his defense both prior to trial and at the trial?

STATEMENT OF THE CASE

For a detailed statement of the case see the Petition for Certiorari filed pages 3 to 4. Suffice it to say the Petitioner was indicted for aborting a *pregnant* woman (Petitioner's Appendix 1a). The Government in their opening statement said they would prove pregnancy and in support of that allegation they introduced testimony showing how pregnant the witness was at the time of the alleged abortion and introduced inflammatory testimony showing the size of the fetus destroyed including vivid descriptions of the length and size of the fetus in support of the allegation of pregnancy contained in the indictment. In Petitioner's prior trial the jury had been instructed that they must believe that the woman was pregnant as alleged in the indictment beyond a reasonable doubt.

Petitioner's main defense was directed to the issue of pregnancy and he produced a number of witnesses calculated to impeach the Government contention of pregnancy. All through the trial the court, the prosecuting attorney and Petitioner's counsel considered pregnancy to be a material element. When the last witness testified for the Government, a Doctor Murphy, and after he had stated that the complaining witness could not have ejected a fetus of the size and description testified to by the complaining witness the court on its own motion sua sponte for the first time stated that all prior decisions for the United States Court of Appeals for the District of Columbia Circuit were obiter dicta and *ruled that all testimony on the issue of pregnancy was immaterial.* The jury was instructed over the objections of Petitioner's counsel, that the pregnancy alleged in the indictment was immaterial and they could convict the Petitioner even if the complaining witness were not pregnant as alleged in the indictment. Petitioner was convicted and sentenced to twenty months to five years in the penitentiary.

ARGUMENT

1. The Sixth Amendment to the Constitution is violated when one is not adequately informed of the charges against him so that a defense can be intelligently prepared. It is also violated, as it was in this case, when an accused is given misleading information as to the charges against him such that he is prejudicially misled into preparing his defense both prior to trial and at the time of trial.

The indictment in this case read as follows:

> "On or about May 2, 1951, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, *who was then pregnant,* used upon her an instrument and means of a kind unknown to the Grand Jury, and administered to her medicine, drug and substance of a kind unknown to the Grand Jury."

With this indictment before the Petitioner, we call the Court's attention to the items listed under Petitioner's preparation prior to trial listed at pages 5 to 7 in the Petitioner's Petition for a Writ of Certiorari. The reality of the prejudice which resulted at the Petitioner's trial is listed at pages 8 and 9 in the Petitioner's Petition for a Writ of Certiorari.

We sincerely suggest to this Court that involved in this case is an issue far transcending the merits or lack of merits to the charges involved in the Petitioner's case. *The substantial constitutional issue which is squarely before this Court is whether the Government may insert matter in an indictment, consider that matter material, introduce testimony in support of it, such that the accused meets the issue at the trial in the belief that it is a material element, only to have his defense literally pulled from under him by a ruling at the conclusion of the trial that all the testimony on this issue is immaterial.* In this case, the Petitioner *prepared his defense to a charge* that he allegedly *aborted a pregnant woman* only to find at the conclu-

sion of the trial that it didn't matter whether the woman was pregnant or not and all his defense on this issue was thus stricken. Needless to say, the Government enjoyed the substantial benefit of introducing the inflammatory testimony on this "immaterial issue" in the form of descriptive testimony of the fetus, the size of the fetus, the bleeding and destruction of the fetus, the length of the pregnancy and other matters intended to support the allegation in the indictment of pregnancy.

The facts in this case come precisely within the rule announced by this Court in *Berger* v. *United States*, 295 U. S. 78, where this Court in discussing the ramifications of the Sixth Amendment stated:

> "In Washington and G & R Company vs. Hickey, 166 U. S. 521, 41 L. Ed. 1101, 17 S. Ct. 661, this Court said that 'No variance ought ever to be regarded as material where the allegation and proof substantially correspond or where the variance was not of a character which could have misled the defendant at trial.'"

We think it is fundamental to due process of law that an accused under the protections of the Sixth Amendment must be clearly informed of the charges against him and if he is given misleading charges containing misleading elements and is thus misled into a useless defense, he is denied the protection of the Sixth Amendment. To allow the Government to benefit from such a device would be to encourage misleading indictments such as occurred in this case and will in effect nullify the substantial benefits of the Sixth Amendment. No one can dispute that our defense in this case throughout the whole trial was devoted to battering the Government contention of pregnancy as alleged in the Government indictment. We were therefore prejudicially misled into a fruitless defense and we therefore

say it is the duty of this Court to grant this Petition for Rehearing.

Respectfully submitted,

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ALBERT J. AHERN, JR.
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I certify that this Petition is filed in good faith and not for the purpose of delay. and is restricted to the grounds stated in par 2 of Rule 58.

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ALBERT J. AHERN, JR.